

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

TOT PROPERTY HOLDINGS, LLC,	)	
TOT LAND MANAGER, LLC, TAX	)	
MATTERS PARTNER,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 5600-17.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

Pursuant to Rule 152(b) of the Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the proceedings in the above case before the undersigned judge at Washington, D.C., containing his oral findings of fact and opinion rendered at the trial session at which the case was heard.

In accordance with the oral findings of fact and opinion, decision will be entered for the Commissioner.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
December 13, 2019

**SERVED Dec 13 2019**

1 Bench Opinion by Judge David Gustafson  
2 November 22, 2019  
3 TOT Property Holdings, LLC v. Commissioner  
4 Docket No. 5600-17

5 THE COURT: The Court has decided to render the  
6 following as its oral Findings of Fact and Opinion in this  
7 case. This Bench Opinion is made pursuant to the  
8 authority granted by section 7459(b) of the Internal  
9 Revenue Code (26 U.S.C.), and Tax Court Rule 152; and it  
10 shall not be relied on as precedent in any other case.

11 Petitioner in this case is TOT Land Manager,  
12 LLC, the tax matters partner ("the TMP") of TOT Property  
13 Holdings, LLC ("TOT"). ("TOT" is the initials of "Trail  
14 of Tears", the route of a 19th Century forced relocation  
15 of Native Americans, which route passed through or near  
16 the property at issue in this case.) In 2013 TOT executed  
17 a deed (Ex. 16-J) declaring a conservation easement in  
18 favor of a tax-exempt charitable organization; and on its  
19 tax return for that year-- Form 1065, "U.S. Return of  
20 Partnership Income" (Ex. 2-J)--TOT claimed a charitable  
21 contribution deduction of \$6.9 million. (In this opinion,  
22 numbers are rounded, and the precise numbers are stated in  
23 or can be inferred from the parties' stipulations.) By  
24 notice of final partnership administrative adjustments  
25 dated January 3, 2017 (the "FPAA" (Stip 2; Ex. 1-J)), the

1 Commissioner disallowed the deduction and determined that  
2 penalties were applicable. The issues for the Court to  
3 decide are whether TOT was entitled to the deduction, the  
4 amount of the deduction, if any, that represented the fair  
5 market value of the conservation easement, and whether  
6 penalties are applicable. We hold that TOT is not  
7 entitled to the deduction, that the fair market value of  
8 the conservation easement was \$496,000, and that penalties  
9 are applicable.

10 Trial of this case was conducted on November 18  
11 and 19, 2019, in Washington, D.C. At trial, TOT was  
12 represented by John Paul Barrie and Kwabena Yeboah. The  
13 Commissioner was represented by Christopher Bradley and  
14 Kimberly Daigle.

15 FINDINGS OF FACT

16 The property

17 At issue in this case are two parcels consisting  
18 of 652 acres of rural property ("the subject property") in  
19 Van Buren County, Tennessee. (Stip. 11-12.) This acreage  
20 is part of larger tracts acquired in 2005 by Mr. George R.  
21 Dixon for \$745 per acre (see Stip. 7), so that he thereby  
22 acquired the 652 acres at issue for about \$486,000 in  
23 2005. Mr. Dixon thereafter transferred portions of the  
24 property to two limited liability companies ("LLCs") that  
25 he owned--"Evergreen" and "Harper". (Stip. 8-9.)

1           This subject property was at least 32 miles from  
2   the nearest interstate highway. It contained no  
3   mountains, and none was nearby. It contained two small  
4   streams (which were frequently dry) and no lakes. The  
5   utilities available on the subject property in 2013  
6   included telephone and electricity, but no access to  
7   public water. There is no hospital in the County. The  
8   subject property was situated on a larger tract that had  
9   formerly been an artillery range. The surrounding area  
10   was hardwood forests (containing mostly oaks and hickory),  
11   but at some point in the past it had been clear cut and  
12   re-planted with row upon row of loblolly pine, a softwood  
13   common to the Cumberland Plateau that grows the fastest  
14   and is the easiest to manage compared to other softwoods.  
15   (Ex. 36-R, p. 12).

16   Nearby properties

17           Elsewhere in the county were three intended  
18   residential developments that had more or less failed.  
19   The most nearly successful was Overton Retreat, located  
20   about five miles northwest of the subject property, which  
21   had been started and two of its "phases" commenced before  
22   the recession of 2009. Of the 90 lots in those two  
23   phases, 62 lots sold from July 2002 through January 2013,  
24   with the last 3 of those sales occurring between 2009 and  
25   2013; of the lots sold, only 11 were improved as of 2013.



1 (Ex. 35-R, p. 67.) A previously expected third phase at  
2 Overton Retreat was never undertaken. Isha Village was  
3 platted in 2006 or 2007 but had no sales until 2017.  
4 Indian Trails was a failed development reputed to be a  
5 "Ponzi scheme", and no infrastructure was ever built. (A  
6 fourth development, Long Branch Lakes, is a master-planned  
7 gated community in Spencer, Tennessee, located north of  
8 the subject property. Long Branch Lakes was apparently  
9 successful prior to 2013, but no evidence was presented  
10 regarding whether it was still selling lots in 2013.  
11 Because it was an already-developed community, neither  
12 party treated it as comparable to the subject property.  
13 (See Ex. 33-P, p. 94.))

14 Value of pre-easement property

15 The Commissioner's expert was Mr. Gerald Barber,  
16 an expert in the field of real estate valuation and  
17 conservation easements, as well as landscape architecture  
18 and land planning. Persuaded by his report (Ex. 35-R) and  
19 testimony (discussed below), we find that as of December  
20 2013 (and before the conservation easement at issue in  
21 this case), the highest and best use of the subject  
22 property was not residential development but was instead  
23 recreational use and timber harvesting, and the fair  
24 market value of the subject property was \$1.128 million.

25 Transfer of ownership

1           Sometime before November 2013, TOT and the TMP  
2   were formed as LLCs entirely owned by Mr. Dixon's LLCs,  
3   Evergreen and Harper. In November 2013 Evergreen and  
4   Harper transferred the subject property to TOT. (Stip.  
5   11-12.) As of that time, the subject property was still  
6   owned by Mr. Dixon--but indirectly, through his several  
7   LLCs. (Ex. 14-J.)

8           PES Fund VI, LLC ("PES"), was formed by persons  
9   other than Mr. Harper in order to acquire (indirectly) the  
10   subject property by acquiring interests in TOT (the entity  
11   that owned that property). (Stip. 13.) PES accomplished  
12   this acquisition by purchasing almost all of the ownership  
13   interests in TOT that had previously been owned by various  
14   of Mr. Dixon's LLCs. Mr. Dixon's LLCs retained a total  
15   of 1 percent of the ownership of TOT, and PES acquired the  
16   other 99 percent of TOT. (Ex. 15-J.) PES thereby  
17   indirectly acquired 99 percent of the subject property.  
18   That is, PES owned 99 percent of TOT, and TOT owned the  
19   subject property. Immediately prior to PES's acquisition  
20   of 99 percent of TOT, the assets of TOT consisted of the  
21   subject property and \$100.

22           To acquire its 99 percent of TOT (and, thereby,  
23   its 99 percent indirect ownership of the subject  
24   property), PES paid \$717,200 in cash (see Ex. 13-J, sec.  
25   2(c)(1)) and assumed the obligation to make capital

1 contributions of \$322,000 (see Ex. 5-J, sec. 7.01(a); cf.  
2 Ex. 13-J, sec. 2(c)(ii)), for total consideration of  
3 \$1,039,200. (That total payment to acquire 99 percent of  
4 the property suggests a 100 percent value of roughly \$1.05  
5 million.)

6 Deed of easement

7 TOT donated to the Foothills Land Conservancy  
8 ("Foothills") a conservation easement over the subject  
9 property. The easement extends over 637 acres, not the  
10 entire 652 acres of the subject property, because the  
11 easement excludes three 5-acre "inholdings". (Doc. 27,  
12 para. 2.) The deed of conservation easement (Ex. 16-J)  
13 was dated December 27, 2013. (Stip. 17.) Foothills is a  
14 qualified organization under section 170(h)(1)(B) and  
15 (h)(3); the conservation easement serves a conservation  
16 purpose under section 170(h)(4); and TOT received from  
17 Foothills a contemporaneous written acknowledgment for the  
18 donation of the conservation easement, within the  
19 requirements of section 170(f)(8). (Doc. 27, paras. 3-5.)

20 Section 9 of the deed is pertinent to a  
21 "proceeds" issue that we address in this opinion. Section  
22 9.1 of the deed contemplates the possibility of judicial  
23 extinguishment of the easement and invokes section 9.2 to  
24 calculate the proceeds due to Foothills if such an event  
25 were to occur. Section 9.2 of the deed provides: "This

1 Easement constitutes a real property interest immediately  
2 vested in Grantee, which, for the purposes of Section 9.1,  
3 the parties stipulate to have a fair market value  
4 determined by multiplying (a) the fair market value of the  
5 Property unencumbered by this Easement (minus any increase  
6 in value after the date of this grant attributable to  
7 improvements) by (b) a fraction, the numerator of which is  
8 the value of this Easement at the time of the grant and  
9 the denominator of which is the value of the Property  
10 without deduction of the value of this Easement at the  
11 time 6 of this grant.... It is intended that this Section  
12 9.2 be interpreted to adhere to and be consistent with 26  
13 C.F.R. Section 1.170A-14(g) (6) (ii)." (Section 9.3,  
14 addressing eminent domain or condemnation, has an  
15 equivalent provision.)

16 Value of post-easement property

17 Again persuaded by the report (Ex. 35-R) and  
18 testimony of the Commissioner's expert, Mr. Gerald Barber  
19 (discussed below), we find that as of December 2013 but  
20 after the conservation easement at issue in this case, the  
21 highest and best use of the subject property remained  
22 recreational use and timber harvesting, and the fair  
23 market value of the subject property, encumbered by the  
24 easement, was \$632,000. The difference between that post-  
25 easement value and the pre-easement value of \$1.128

1 million--i.e., \$496,000--is the fair market value of the  
2 easement.

3 Tax return and examination

4 TOT timely filed its tax return for the short  
5 calendar year beginning December 11, 2013 (Stip. 3, Ex. 2-  
6 J). On that return TOT reported a charitable contribution  
7 of a qualified conservation easement of \$6.9 million and  
8 attached to its return a qualified appraisal, by David R.  
9 Roberts, a qualified appraiser, as required by section  
10 170(f)(11). (Doc. 27, para. 6.) That appraisal valued  
11 the easement at \$6.9 million. (Ex. 17-J, p. 2).

12 The IRS examined the return. (Stip. 22.)  
13 Revenue Agent Adrienne Thomas did the examination. She  
14 prepared a revenue agent's report ("RAR", in this instance  
15 consisting of Forms 4605-A, 886-Z, and 886-A). The RAR  
16 proposed the disallowance of the charitable contribution  
17 deduction for the conservation easement, proposed the 40  
18 percent penalty for gross overvaluation misstatement, and  
19 proposed in the alternative a 20 percent penalty for  
20 substantial valuation misstatement or for negligence.  
21 Group Manager Tomika Mickles signed a Letter 1807  
22 addressed to TOT's TMP, dated May 10, 2016, that  
23 transmitted Agent Thomas's RAR and that invited the TMP to  
24 attend a "closing conference". The letter stated: "We  
25 enclosed a copy of our summary report .... The report

1 explains all proposed adjustments ...." (Ex. 21-J.)

2 The parties have stipulated that Agent Thomas  
3 "made the initial determination" as to penalties and that  
4 Group Manager Mickles "was her immediate supervisor".  
5 (Stip. 23-24.)

6 Ms. Mickles signed a "Civil Penalty Approval  
7 Form" dated July 8, 2017 (Ex. 24-J).

8 On January 3, 2017, the Commissioner timely  
9 issued the FPAA to TOT's TMP. (Stip. 2, Ex. 1-J.)

10 Tax Court proceedings

11 The TMP timely filed a petition in this Court on  
12 March 7, 2017. At that time, the principal place of  
13 business of both TOT and the TMP was in Georgia. (Stip.  
14 1.)

15 David R. Roberts, the appraiser whose \$6.9  
16 million appraisal was attached to the tax return, is now  
17 deceased. TOT therefore hired another appraiser, Mr.  
18 Thomas Wingard, an expert in valuation of conservation  
19 easements, who testified at trial. He ascribed to the  
20 subject property a highest and best use of "residential  
21 development". Mr. Wingard's before-easement value was  
22 \$3.9 million; his after-easement value was \$1.2 million;  
23 and he opined that the value of the easement--the  
24 difference between those before and after values--was \$2.7  
25 million.

1           The Commissioner's expert witness, Mr. Barber,  
2   opined that the highest and best use of the subject  
3   property was recreational use and timber harvesting. Mr.  
4   Barber's before-easement value was \$1.128 million; his  
5   after-easement value was \$632,000; and he opined that the  
6   value of the easement--the difference between those before  
7   and after values--was \$496,000.

## 8                           DISCUSSION

### 9   I.           Burden of proof

10           As a general rule, the Commissioner's  
11   determinations in an FPAA are presumed correct, and a  
12   party challenging an FPAA bears the burden of proving that  
13   the Commissioner's determinations are in error. Rule  
14   142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933).

### 15   II.          Deduction for qualified conservation 16   contribution

#### 17           A.   General rules

18           Section 170(a)(1) allows a deduction for any  
19   charitable contribution made within the taxable year. If  
20   the taxpayer makes a charitable contribution of property  
21   other than money, the amount of the contribution is  
22   generally equal to the fair market value of the property  
23   at the time the gift is made. See 26 C.F.R. sec. 1.170A-  
24   1(c)(1). The Code generally restricts a taxpayer's  
25   charitable contribution deduction for the donation of "an

1 interest in property which consists of less than the  
2 taxpayer's entire interest in such property." Sec.  
3 170(f)(3)(A). But there is an exception to this rule for  
4 a "qualified conservation contribution." Sec.  
5 170(f)(3)(B)(iii).

6 Section 170(h)(1) defines a "qualified  
7 conservation contribution" as a contribution of a  
8 "qualified real property interest" to a "qualified  
9 organization" "exclusively for conservation purposes".  
10 The parties stipulated prior to trial that Foothills is a  
11 qualified organization under sections 170(h)(1)(B) and  
12 (h)(3). (Doc. 27; para. 3). Under 170(h)(2)(C), a  
13 "qualified real property interest" includes an interest in  
14 real property that is a restriction granted in perpetuity  
15 on the use of the real property. Section 170(h)(5)(A)  
16 provides that a contribution is not treated as exclusively  
17 for conservation purposes unless the conservation purpose  
18 is protected in perpetuity.

19 B. Disputed issues

20 The Commissioner advances three grounds for the  
21 denial of the deduction for the charitable contribution of  
22 the conservation easement, the first two of which relate  
23 to the requirement that the conservation purpose must be  
24 protected in perpetuity. First, the Commissioner contends  
25 that sections 9.1 and 9.2 of the deed of easement, which



1 specify the allocation of the proceeds from a sale of the  
2 easement if it is ever extinguished as a result of  
3 judicial proceedings, fail to protect the conservation  
4 purpose in perpetuity. Second, the Commissioner asserts  
5 that section 17.12 of the deed impermissibly permits  
6 extinguishment of the easement pursuant to a state law  
7 merger which would occur if the easement was "returned by  
8 specific conveyance to the holder of the fee", a  
9 circumstance explicitly contemplated by rather than  
10 precluded by the language of the deed. Finally, the  
11 Commissioner argues that certain rights reserved to TOT as  
12 the donor-- specifically, the right to conduct commercial  
13 forestry under section 4.6--are inconsistent with the  
14 conservation interests of the easement to the extent that  
15 they defeat its conservation purpose. We address the  
16 first ground the Commissioner asserts as the basis for  
17 denial of the deduction and find that our determination on  
18 this issue is dispositive, so that we need not address the  
19 other two.

20 C. Proceeds from extinguishment

21 1. The proportionality requirement

22 In order to satisfy the requirement that the  
23 conservation purpose be protected in perpetuity, any  
24 interest in the property retained by the donor must be  
25 subject to legally enforceable restrictions that will



1 prevent uses of the retained interest inconsistent with  
2 the conservation purpose of the donation. 26 C.F.R. sec.  
3 1.170A-14(g). It is possible that an easement may be  
4 extinguished by a court order, and in such an instance the  
5 easement would not have lasted in perpetuity. However,  
6 the regulations provide that if, an extinguishment does  
7 occur, the donation will nonetheless be deemed to have  
8 been in perpetuity if the proceeds of the extinguishment  
9 are paid to the donee organization and the donee uses them  
10 for its conservation purposes. The regulation requires as  
11 follows: "[F]or a deduction to be allowed under this  
12 section, at the time of the gift the donor must agree that  
13 12 the donation of the perpetual conservation restriction  
14 gives rise to a property right, immediately vested in the  
15 donee organization, with a fair market value that is at  
16 least equal to the proportionate value that the perpetual  
17 conservation restriction at the time of the gift, bears to  
18 the value of the property as a whole at that time....  
19 [T]hat proportionate value of the donee's property rights  
20 shall remain constant.... [T]he donee organization, on a  
21 subsequent sale, exchange, or involuntary conversion of  
22 the subject property, must be entitled to a portion of the  
23 proceeds at least equal to that proportionate value of the  
24 perpetual conservation restriction ...." Id. sec. -  
25 14(g)(6)(ii).

1           In a recent opinion of this Court, Coal Property  
2   Holdings v. Commissioner, 153 T.C. \_\_, \_\_ (Oct. 28, 2019),  
3   we addressed the deductibility of a conservation  
4   contribution where the easement deed contained a  
5   proportionality formula identical to the formula in the  
6   easement at issue here. In Coal Property, as in the  
7   instant case, the deed provided that the donee's share of  
8   the proceeds of a judicial extinguishment would be  
9   calculated by using the easement's proportion of value, as  
10   determined at the time of the gift (so far, so good), but  
11   multiplying it not against the property's total fair  
12   market value at the time of sale but rather against the  
13   property's fair market value at the time of sale "minus  
14   any increase in value after the date of th[e] grant  
15   attributable to improvements". This subtraction, which  
16   diminishes the donee's share of the proceeds, is not  
17   permitted. Under the regulation, a "donee must be  
18   entitled to a portion of the proceeds at least equal to  
19   that proportionate value of the perpetual conservation  
20   restriction"; or else this limited exception to the  
21   perpetual use restriction of the conservation easement is  
22   not satisfied and the donor has failed to satisfy the  
23   requirement that the conservation purpose of the  
24   contribution be protected in perpetuity. See 26 C.F.R.  
25   sec. 1.170A-14(g)(6)(ii). The donee's entitlement to a

1 proportionate share of the extinguishment proceeds must be  
2 absolute. See Coal Property, slip op. at 18 (citing  
3 Carroll v. Commissioner, 146 T.C. 196, 212 (2016)). In  
4 Coal Property, we held that a formula identical to that  
5 found at section 9.2 of the deed of easement in this case  
6 (Ex. 16-J, pp. 17-18) fails to accomplish the regulatory  
7 requirement that the donee receive a proportionate share  
8 of the proceeds in the event of a sale. (Slip op. at 22.)

9 2. The "Treasury Regulation override"

10 TOT advances the same defense as the petitioner  
11 in Coal Property, arguing that the perpetuity requirement  
12 of the regulation is not violated by TOT's deed because,  
13 under the deed, the formula for allocating proceeds must  
14 be applied consistently with what TOT characterizes as a  
15 "Treasury Regulation override" in sections 9.1 and 9.2 of  
16 the deed:

17 Section 9.1 provides that the "proportionate  
18 part" of the value to which the donee is entitled is  
19 "determined in accordance with Section 9.2 or 26 C.F.R.  
20 Section 1.170A-14, if different." And section 9.2  
21 provides: "It is intended that this Section 9.2 be  
22 interpreted to adhere to and be consistent with 26 C.F.R.  
23 Section 1.170A-14(g)(6)(ii)." TOT contends that this  
24 language overrides any aspect of the proceeds provision  
25 that violates the regulation.

1           TOT acknowledges that a donor cannot reserve an  
2   impermissible right in an easement deed but then save his  
3   charitable contribution by mentioning the rule he has  
4   violated and calling for that rule to kick in and save the  
5   day if his violation subsequently comes to light. If this  
6   language in section 9.2 constitutes such a savings clause,  
7   then it is not enforceable and cannot salvage what would  
8   otherwise be a failure of the formula to provide Foothills  
9   with the proportional value of the proceeds from a future  
10  sale of the easement to which it is entitled. See Coal  
11 Property, slip op. at 26, citing Belk v. Commissioner, 774  
12 F. 3d 223 (4th Cir. 2014), aff'g 140 T.C. 1 (2013).

13           TOT disputes, however, that section 9.2 contains  
14 a savings clause triggered by an impermissible condition  
15 subsequent. It contends, rather, that the provisions in  
16 section 9 are interpretive provisions. The parties agree  
17 that Section 9.2 is identical, word for word, to the  
18 "Treasury Regulation override" that was present in Coal  
19 Property; but TOT argues that Coal Property is  
20 distinguishable because the procedural posture of that  
21 case was a decision on summary judgment and because no  
22 evidence was presented to explain the intent behind the  
23 drafting of the provision. However, the evidence TOT  
24 presented on the supposed intent behind the provision does  
25 not persuade us of TOT's position.

1 Mark Jendrick, the attorney responsible for  
2 drafting the deed, testified that he included sections 9.1  
3 and 9.2 in the deed from a standard form that he used as a  
4 starting point to draft many similar easements for  
5 Foothills, and that the reason for its inclusion was to  
6 protect Foothills' interests in the transaction. He  
7 further explained that, as a fundamental rule of contract  
8 drafting, a statement of the parties' intent should be  
9 included if there is ever a question that a court would  
10 conduct a hindsight analysis on that issue.

11 The language at issue will constitute a savings  
12 clause if it applies "to retroactively reform the deed to  
13 comply with the regulations." Palmolive Bldg. Inv'rs, LLC  
14 v. Commissioner, 149 T.C. 380, 404 (2017). Sections 9.1  
15 and 9.2 of the deed contain a complete and unambiguous  
16 expression of the formula to apply to the proceeds and the  
17 conditions under which it is implicated. Accordingly, to  
18 the extent that Mr. Jendrick's testimony attempts to state  
19 the intentions of the parties that they wanted these  
20 provisions to operate other than as explicitly set forth  
21 in the language of the deed, that testimony is not  
22 admissible and cannot be considered for that purpose. See  
23 Tenn. Code Ann. sec. 47-2-202; In re Tom Woods Used Cars,  
24 Inc., 23 B.R. 563, 567 (Bankr. E.D. Tenn. 1982) (where a  
25 writing is intended as a final expression of the parties'

1 agreed terms, proof of inconsistent terms outside of the  
2 written agreement is barred by the parol evidence rule).  
3 To the extent that Mr. Jendrick's testimony simply  
4 expresses his own intentions as the drafter of the deed,  
5 it has little, if any bearing on the legal question of the  
6 operation of the contract language. See Belk v.  
7 Commissioner, 774 F. 3d at 229-230.

8           Sections 9.1 and 9.2 apply a specific formula  
9 (including an explicit subtraction) to calculate the  
10 proceeds due to Foothills in the event of a sale, and  
11 those sections direct a different result only if or when  
12 there is an adverse determination as to the deductibility  
13 of the prior conservation contribution under sec. 1.170A-  
14 14(g)(6). If the terms of section 9 of the deed had never  
15 come to light in a tax proceeding, and if later the  
16 easement had ever been judicially extinguished, there is  
17 no reason to suppose that a court distributing proceeds  
18 would have overruled the express terms of section 9.2.  
19 TOT has not satisfied us that the language in sections 9.1  
20 and 9.2 serves merely as an expression of the intent of  
21 the parties. We therefore hold that section 9.2 of the  
22 deed contains a condition subsequent savings clause that  
23 will not remedy the failure of that section to afford  
24 Foothills the right to a "portion of the proceeds at least  
25 equal to that proportionate value of the perpetual

1 conservation restriction", as required by section 1.170A-  
2 14(g)(6)(ii). Therefore, the conservation purpose of the  
3 easement that TOT granted to Foothills was not "protected  
4 in perpetuity" within the meaning of section 170(h)(5)(A).  
5 For this reason, we find that the Commissioner properly  
6 denied the deduction; and we therefore need not reach the  
7 other grounds advanced on that issue.

8 III. Valuation of the Conservation Easement

9 Even though we hold that the deduction for the  
10 conservation easement was properly denied, the fair market  
11 value of the easement at the time of its donation must  
12 still be established in order to determine, pursuant to  
13 section 6221, the issue of what penalties, if any, are  
14 "applicab[le]". See PBBM-Rose Hill, Ltd. v. Commissioner,  
15 900 F. 3d 193, 214 (5th Cir. 2018).

16 A. Valuation principles

17 In general, the valuation of a perpetual  
18 conservation restriction such as the easement at issue in  
19 this case is the fair market value at the time of the  
20 contribution; however, where no substantial record of  
21 sales of easements comparable to the donated easement is  
22 available to provide a meaningful or valid comparison, the  
23 regulations authorize valuation of the easement by  
24 determining the difference between the fair market value  
25 of the property before, as compared to after, the donation



1 of the easement. 26 C.F.R. sec. 1.170A-14(h) (3) (i), (ii).  
2 The "before and after" method of valuation was employed by  
3 both valuation experts in this case. When this method is  
4 used, the appraisal of the property before the easement  
5 "must take into account not only the current use of the  
6 property but also an objective assessment of how immediate  
7 or remote the likelihood is that the property, absent the  
8 restriction, would in fact be developed, as well as any  
9 effect from zoning, conservation, or historic preservation  
10 laws that already restrict the property's potential  
11 highest and best use." Id., sec. -14(h) (3) (ii). The  
12 appraisal after the easement "must take into account the  
13 effect of restrictions that will result in a reduction of  
14 the potential fair market value represented by highest and  
15 best use but will, nevertheless, permit uses of the  
16 property that will increase its fair market value above  
17 that represented by the property's current use." Id.

18 As is typical in such cases, both parties relied  
19 on expert testimony. The determination of whether expert  
20 testimony is helpful to the trier of fact is a matter  
21 within the Court's sound discretion. See Laureys v.  
22 Commissioner, 92 T.C. 101, 127 (1989). The Court  
23 evaluates expert opinions in light of each expert's  
24 demonstrated qualifications and all other evidence in the  
25 record. Parker v. Commissioner, 86 T.C. 547, 561 (1986).

1 The appraiser must use common sense and informed judgment  
2 to analyze all the facts and circumstances of each case,  
3 maintaining "a reasonable attitude in recognition of the  
4 fact that valuation is not an exact science." Rev. Rul.  
5 59-60, sec. 3.01, 1959-1 C.B. 237, 238. We are not bound  
6 by an expert's opinions and may accept or reject an expert  
7 opinion in full or in part, in the exercise of sound  
8 judgment. Helvering v. Nat'l Grocery Co., 304 U.S. 282,  
9 295 (1938); Parker v. Commissioner, 86 T.C. at 561-562.

10 B. Competing contentions

11 TOT's expert, Mr. Wingard, opined that the fair  
12 market value of the property before the donation of the  
13 easement was \$3.9 million and that the value of the  
14 property after the easement was \$1.2 million, thereby  
15 valuing the easement at \$2.7 million. (Ex. 33-P). The  
16 Commissioner's expert, Mr. Barber, opined that the fair  
17 market value of the property before the donation of the  
18 easement was \$1.128 million and that the value of the  
19 property after the easement was \$632,000, thereby valuing  
20 the easement at \$496,000. (Ex. 35-R).

21 C. Highest and best use

22 Central to the disparity in the valuation  
23 experts' testimony is their disagreement over the highest  
24 and best use of the property before TOT's donation of the  
25 easement to Foothills. Mr. Wingard concluded that the

1 highest and best use of the property before the donation  
2 of the easement was for residential development,  
3 specifically, "low density, destination mountain resort  
4 residential development". (Ex. 33-P, p. 49). We find  
5 that use to have been highly unlikely because of the  
6 property's characteristics and the failed developments  
7 that surrounded it.

8 In contrast to Mr. Wingard, the Commissioner's  
9 expert, Mr. Barber, concluded that the highest and best  
10 use of the property before the donation of the easement  
11 was "as an investment property held for recreation and  
12 timber revenue" and that the highest and best use after  
13 the donation of the easement was consistent with its use  
14 prior to the easement: i.e., speculative investment  
15 property with potential for limited timber harvesting with  
16 associated private recreational activities. (Ex. 35-R, p.  
17 70).

18 Notably, Mr. Wingard and Mr. Barber essentially  
19 agree on the "after" assessment of highest and best use of  
20 the property, which Mr. Wingard opined was "agricultural  
21 and passive recreational uses as permitted by the  
22 easement". (Ex. 33-P, p. 174).

23 D. Petitioner's expert's analysis

24 Mr. Wingard employed a qualitative analysis in  
25 his valuation approach, a "study of the relationships

1 indicated by market data without recourse to  
2 quantification" that "reflects the imperfect nature of  
3 real estate markets." (Ex. 33-P, p. 100). To arrive at  
4 the "before" value of the property, he compared the  
5 subject property to two sales in western North Carolina  
6 and three sales in middle Tennessee, with dates of sale  
7 ranging from September 2005 through March 2013. Id. He  
8 noted that "the search for sales in the middle Tennessee  
9 market or even the entire state of Tennessee did not yield  
10 sales similar in size or physical attributes as the  
11 subject." (Ex. 33-P, p. 99). Notably, given his opinion  
12 about highest and best use, all of the supposedly  
13 comparable sales he put forward were of intended  
14 residential developments in mountainous terrain, or with  
15 views of large bodies of water, such as a lake. The  
16 subject property lacks either feature, and we think it is  
17 not conducive to the same use. Mr. Wingard's report did  
18 not include a comparable sale that was "inferior" to, as  
19 opposed to "superior" or "similar" to the subject, see Ex.  
20 33-P, p. 141. The significance of this omission is that  
21 Mr. Wingard did not offer a conclusive number to serve as  
22 a "floor" from which the value of the subject property  
23 could be ascertained.

24 With regard to the factors presented in section  
25 1.170A-14(h)(3)(ii), Mr. Wingard determined that the lack

1 of zoning restrictions on the property made development  
2 legally permissible and that "use as an eventual mountain  
3 related residential development" was physically possible,  
4 as well as financially feasible and indicative of the  
5 maximum economic benefit of the property. The evidence in  
6 the record contradicts Mr. Wingard's conclusion regarding  
7 the property's use. The evidence--including the  
8 photographs in his own report--showed that the subject  
9 land is not mountainous and has no significant physical  
10 features such as vistas or lake views that would lend  
11 itself to such a purpose. The mean value of the five  
12 properties to which he compared the subject property was  
13 \$6,430 per acre, with the supposedly most similar sale  
14 valued at \$6,057 per acre. (Ex. 33-P, p. 145). Mr.  
15 Wingard opined that the subject property had a value of  
16 \$6,000 per acre, but it is unclear how he arrived at a  
17 value for the subject property that is so close to the  
18 values of remote properties with such different physical  
19 characteristics. We found his valuation to be greatly  
20 inflated.

21 E. The Commissioner's expert

22 Mr. Barber conducted a sales comparison approach  
23 to ascertain the "before" value of the property. He did  
24 not consider an income approach to valuation because of  
25 the lack of historical use of the property for income

1 production (Ex. 35-R, pp. 77-78), a judgment we think  
2 reasonable. He opined that commercial timbering was  
3 economically feasible to some extent, but the potential  
4 income stream from any timber harvest conducted for profit  
5 was relatively insignificant due to the lack of demand for  
6 timber in the area during the relevant time period.

7           During his visits to the subject property, Mr.  
8 Barber was able to capture and present drone video footage  
9 that captured its appearance. (Ex. 29-R). Though  
10 visually interesting, the drone footage was consistent  
11 with Mr. Barber's characterization of the property as  
12 being relatively plain and "not pretty," showing no  
13 significant features such as dramatic views, colorful  
14 foliage potential, or lake frontage that, according to Mr.  
15 Barber, might increase the desirability for residential  
16 development on the property.

17           Consistent with his conclusion as to the highest  
18 and best use of the subject property, Mr. Barber compared  
19 the subject property to eight sales of property used for  
20 agricultural and timber recreation that occurred between  
21 August 2005 and August 2011, producing a mean value of  
22 \$1,478 per acre. After removing the lowest and highest  
23 sales, the mean value was \$1,423 per acre. Mr. Barber  
24 settled on a value of \$1,734 per acre, utilizing the three  
25 comparable sales he qualitatively ranked as similar and

1 therefore indicative of the best unit value for the  
2 property. (Ex. 35-R, p. 102). We think his approach was  
3 reasonable.

4 F. Transactions involving the subject property

5 As we explained above, in 2005 Mr. Dixon  
6 acquired the 652 acres at issue for about \$486,000. In  
7 December 2013--days before the contribution of the  
8 easement--PES indirectly acquired a 99 percent interest in  
9 the property for \$1,039,200, suggesting a 100 percent  
10 value of roughly \$1.05 million. Mr. Barber's before value  
11 (\$1.128 million) corresponds roughly to this figure, and  
12 Mr. Wingard's before value (\$3.9 million) is not at all  
13 close to it.

14 Mr. Wingard, TOT's expert, acknowledged that he  
15 had been aware of the PES purchase of 99 percent of TOT,  
16 but he said that he did not take that transaction as a  
17 measure of the value of the subject property; rather, he  
18 said, owning a partial interest in an entity that owns a  
19 property is not the same thing as owning the property  
20 itself. That is certainly true, but when the partial  
21 interest acquired is a 99 percent interest, and when the  
22 property at issue is the only significant asset of the  
23 acquired entity, we think that there will likely be a  
24 correspondence between a price paid for 99 percent of the  
25 entity and the price that the market would pay for the



1 property itself.

2 Mr. Barber, the Commissioner's expert, testified  
3 that in developing his opinion he did not take account of  
4 the December 2013 PES purchase, for the reason (which we  
5 believe) that he had not been made aware of that  
6 transaction at the time he prepared his report and learned  
7 about its details only during the testimony of Mr.  
8 Wingard. Thus, he reached his value (\$1.128 million)  
9 without knowing it was broadly corroborated by the price  
10 suggested by the PES ~~25~~<sup>f</sup> transaction (\$1.05 million). We D6  
11 think this bolsters the persuasiveness of Mr. Barber's  
12 valuation.

13 G. Conclusion on "before" value

14 Based on the improbability of Mr. Wingard's  
15 choice of highest and best use, the credibility of Mr.  
16 Barber's written report and oral testimony, and the  
17 evidence in the record--including the arm's-length sale of  
18 an interest whose value inhered primarily in the subject  
19 property only weeks before the donation of the easement--  
20 Mr. Barber's opinion that the "before" value of the land  
21 was \$1.128 million should be afforded the most weight. We  
22 agree with his "before" value.

23 H. Conclusion on "after" value and easement  
24 value

25 The expert witnesses determined different



1 "after" values for the property-- Mr. Wingard's \$1.2  
2 million and Mr. Barber's \$632,000--but both agree that,  
3 with respect to the "after" value of the subject property,  
4 the highest and best use of the subject property is  
5 investment property held for potential timber and  
6 recreation revenue, which is consistent with the  
7 restrictions of the easement. Neither TOT nor the  
8 Commissioner spent much time at trial cross-examining or  
9 rebutting the opposing expert's "after" value.

10 It is in TOT's interest that the "after" value  
11 be as low as possible, so that the difference between the  
12 two values be as great as possible. Given that we have  
13 determined a "before" value of \$1,128,236 by using Mr.  
14 Barber's value, to now use Mr. Wingard's "after" value of  
15 \$1.2 million would compare apples to oranges and would  
16 have the absurd result of causing the declaration of the  
17 easement to produce a slight increase in the value of the  
18 property.

19 For the reasons stated above and because Mr.  
20 Barber was a more persuasive witness, the Court accepts  
21 his opinion that the value of the easement is \$496,000.

22 IV. Penalties

23 A. Written supervisory approval

24 Section 6751(b)(1) requires that the "initial  
25 determination" of a penalty be approved in writing by the

1 immediate supervisor of the individual making that initial  
2 determination, and it must be approved before "the first  
3 formal communication to the taxpayer of the initial  
4 determination to assess penalties". Clay v. Commissioner,  
5 152 T.C. \_\_, \_\_ (slip op. at 44) (Apr. 24, 2019).

6 The parties have stipulated to all material  
7 facts relevant to the issue of penalty approval under  
8 section 6751(b)(1). (See Stip. 22-30.) In pertinent  
9 part, the facts show that on May 10, 2016, a Letter 1807  
10 enclosing an RAR (Ex. 21)-- which RAR included a statement  
11 proposing, in the alternative, the same penalties later  
12 proposed in the FPAA--was signed by the immediate  
13 supervisor of the revenue agent and was sent to TOT. (The  
14 same supervisor signed a civil penalty approval form  
15 including the identical proposed penalties on July 8,  
16 2016, prior to the issuance of the FPAA that was issued to  
17 TOT on January 3, 2017; but these facts are not essential  
18 to our analysis of section 6751(b)(1).)

19 Notwithstanding the fact that the Letter 1807  
20 was signed by the supervisor, TOT argues that this May 10,  
21 2016, communication both constituted the initial  
22 determination of the penalty and lacked the required  
23 written supervisory approval. The Commissioner urges the  
24 Court to hold that the initial determination was embodied  
25 instead in the FPAA because that communication notified

1 TOT of its right to an appeal but, as a fallback position,  
2 argues that the Letter 1807 constituted the required  
3 written supervisory approval for the penalties asserted  
4 against TOT proposed in the letter and the attached  
5 report.

6 Section 6751(b) does not require written  
7 supervisory approval to be given on any particular  
8 document, see PBBM-Rose Hill, Ltd. v. Commissioner, 900 F.  
9 3d 193, 213 (5th Cir. 2018) (supervisor's signature on a  
10 cover letter to a summary report proposing penalties was  
11 sufficient); Palmolive Building Investors, LLC v.  
12 Commissioner, 152 T.C. <sup>75, 85-86</sup> ~~(slip op. at 17-18)~~ (Feb. D6  
13 ~~28,~~ (2019) (supervisor's signature on a Form 5401-c D5  
14 containing proposed penalties and directing the FPAA be  
15 issued was sufficient).

16 TOT's position is essentially that the Letter  
17 1807 signed by the supervisor and transmitting the agent's  
18 summary report could simultaneously embody the initial  
19 determination of the penalty and lack written supervisory  
20 approval of it-- even though the written signature of the  
21 supervisor appears on the face of the document. The  
22 supervisor was the sole signatory of the letter that  
23 advised of "all proposed adjustments" and transmitted the  
24 report that detailed the penalties (which were later  
25 asserted in the FPAA). These facts establish that the

1 supervisor gave written approval of the initial  
2 determination of the penalties. Accordingly, the Court  
3 holds that the Commissioner has established compliance  
4 with section 6751(b) as to the penalties asserted in this  
5 case.

6 B. Application of penalties

7 Section 6662(a) imposes a penalty equal to 20  
8 percent of an underpayment due to causes enumerated  
9 therein, only three of which are at issue here:  
10 negligence, substantial understatement of income tax, and  
11 substantial valuation misstatement. To the extent that  
12 any portion of an underpayment is attributable to a gross  
13 valuation misstatement (as opposed to a substantial  
14 valuation misstatement), the penalty is increased to 40  
15 percent under section 6662(h). A gross valuation  
16 misstatement exists if the value of the property claimed  
17 on the return is 200 percent or more of the amount  
18 determined to be the correct amount of such valuation.  
19 Sec. 6662(e)(1), (e)(1)(A), (h)(1), (h)(2). The burden is  
20 on the petitioner to prove that the penalty is  
21 inappropriate because of reasonable cause and good faith.  
22 See Higbee v. Commissioner, 116 T.C. 438, 446-447 (2001).

23 The Court has found that the value of the  
24 conservation easement was \$496,000. The value TOT claimed  
25 for the same item on the return was \$6.9 million. Ex. 2-

1 J, pp. 9, 12. The underpayment attributable to the  
2 valuation misstatement for this item was therefore the  
3 difference between the two numbers, --i.e., more than \$6.4  
4 million, a value that exceeds 200 percent of \$496,000, or  
5 \$992,000. Accordingly the gross valuation misstatement  
6 penalty of 40 percent of the underpayment is applicable to  
7 the amount of the underpayment attributable to the  
8 valuation misstatement of this item. See sec. 6662(e)(1),  
9 (e)(1)(A), (h)(1), (h)(2).

10 The Commissioner asserts that a negligence  
11 penalty should apply to the underpayment attributable to  
12 the first \$496,000 of the deduction at issue, since that  
13 portion of the underpayment was not attributable to a  
14 valuation misstatement but rather to TOT's claiming on its  
15 tax return a charitable deduction to which it was not  
16 entitled. Negligence has been defined as lack of due care  
17 or failure to do what a reasonably prudent person would do  
18 under like circumstances. See, e.g., Ocmulgee Fields,  
19 Inc. v. Commissioner, 132 T.C. 105, 123, aff'd, 613 F.3d  
20 1360 (11th Cir. 2010). It also "includes any failure to  
21 make a reasonable attempt to comply with the provisions of  
22 the internal revenue laws or to exercise ordinary and  
23 reasonable care in the preparation of a tax return." 26  
24 C.F.R. sec. 1.6662-3(b)(1).

25 The Court finds that the negligence penalty is

1 applicable. It must be noted that TOT did not claim two  
2 deductions--one reasonable deduction for \$496,000 that  
3 corresponded to the actual value of its easement and  
4 another unreasonable one for the plainly excessive  
5 additional amount of \$6.4 million. Rather, TOT claimed a  
6 single deduction--for the grossly excessive amount of \$6.9  
7 million. The enormous difference between the \$6.9 million  
8 deduction claimed for the easement alone and the \$1.05  
9 million actually paid for the entire property in the  
10 recent arm's-length transaction must have been and surely  
11 was obvious to TOT.

12 As recently as its pretrial memorandum, TOT  
13 advanced reasonable cause and good faith as a defense to  
14 the penalties at issue here, pursuant to section 6664(c).  
15 The language of section 6664(c)(3) contains a special rule  
16 for an underpayment attributable to a valuation  
17 overstatement of charitable deduction property (such as is  
18 at issue in this case). While the text of section  
19 6664(c)(3) appears to eliminate the defense as it applies  
20 to gross valuation misstatements, the corresponding income  
21 tax regulation seems to contemplate its availability,  
22 subject to heightened requirements. See 26 C.F.R. sec.  
23 1.6664-4(h). We assume for the sake of discussion that  
24 the defense might be available in a case like this.

25 However, during closing arguments at the

1 conclusion of trial, when the Court inquired as to TOT's  
2 support for its reasonable cause defense, its counsel  
3 stated that, in defense against the penalties, TOT relies  
4 on section 6751(b)(1) (discussed above). He thus  
5 apparently abandoned the reasonable cause defense-- and  
6 for good reason:

7 As to the valuation misstatement penalties,  
8 although the parties have stipulated that the appraisal  
9 that accompanied the return was a qualified appraisal  
10 performed by a qualified appraiser, see sec. 1.6664-  
11 4(h)(i), TOT failed to present any evidence that "in  
12 addition to obtaining a qualified appraisal, the taxpayer  
13 made a good faith investigation of the value of the  
14 contributed property." Sec. 1.6664-4(h)(ii).  
15 Accordingly, TOT cannot establish the defense of  
16 reasonable cause and good faith as to the valuation  
17 misstatement penalties.

18 As the defense of reasonable cause and good  
19 faith relates to the negligence penalty, section  
20 6664(c)(1) provides that the accuracy-related penalty  
21 shall not be imposed with respect to any portion of an  
22 underpayment if it is shown that there was reasonable  
23 cause for that portion and the taxpayer acted in good  
24 faith with respect to that portion. "The determination of  
25 whether a taxpayer acted with <sup>32</sup> reasonable cause and in



1 good faith is made on a case-by-case basis, taking into  
2 account all pertinent facts and circumstances . . .  
3 Reliance on \* \* \* professional advice \* \* \* constitutes  
4 reasonable cause and good faith if, under all the  
5 circumstances, such reliance was reasonable and the  
6 taxpayer acted in good faith." 26 C.F.R. sec. 1.6664-  
7 4(b)(1); see also sec. 1.6664-4(c).

8 The parties stipulated that TOT hired an  
9 appraiser to appraise the easement and hired accountants  
10 to prepare their return, but TOT put on no evidence that  
11 it actually relied on any professional advice and put on  
12 no evidence as to its efforts to determine and report its  
13 proper tax liability. Its grossly exaggerated \$6.9 million  
14 deduction is starkly contrary to any such efforts. We  
15 hold that TOT failed to establish the defense of  
16 reasonable cause and good faith as to any portion of its  
17 underpayment.

18 V. Conclusion

19 TOT's deduction for a qualified conservation  
20 contribution to Foothills is denied in its entirety. The  
21 value of the property interest contributed to Foothills  
22 was \$496,000. The Commissioner proved compliance with the  
23 requirements of section 6751(b) to obtain written  
24 supervisory approval of the penalties he asserted in the  
25 first formal communication to the taxpayer of the initial



1 determination of the penalties. Accordingly, the gross  
2 valuation misstatement penalty is applicable to the  
3 underpayment attributable to the valuation misstatement.  
4 A negligence penalty is applicable to any remaining  
5 portion of the underpayment attributable to the denied  
6 deduction. TOT failed to establish reasonable cause and  
7 good faith for taking the deduction.

8 Decision will be entered for the Commissioner.

9 This concludes the Court's oral Findings of Fact  
10 and Opinion in this case.

11 THE CLERK: All rise.

12 (Whereupon, at 3:49 p.m., the above-entitled  
13 matter was concluded.)  
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